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No. 207

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IN THE

SUPREME COURT OF THE UNITED STATES.

GENE JACOBS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

GEORGE F. McCANLESS,
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State of Tennessee.

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Assistant Attorney General,
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The Respondent, State of Tennessee, for its statement in opposition to the petition for the writ of certiorari would respectfully show to the Court:

The petitioner, Gene Jacobs, was convicted by a jury in Davidson County, Tennessee, for the offense of conspiring to violate the elections laws of the State of Tennessee as defined in Section 39-1105, Tennessee Code Annotated. The conviction was affirmed by the Supreme Court of Tennessee in an unreported opinion dated March 4, 1965, but attached to the petition as Appendix "G". The petitioner now seeks a review by this Honorable Court, hence his petition for writ of certiorari. The jurisdiction of this Court to issue the writ and review the conviction is admitted.

QUESTION PRESENTED.

The question presented by counsel for the petitioner can be simplified as follows: Whether or not the overt acts alleged in the indictment to support the conspiracy to violate the elections laws of the State of Tennessee were in sufficient detail to apprise the petitioner of the offense for which he was charged.

STATEMENT OF THE CASE.

The indictment alleged that the petitioner in concert with others named in the indictment did unlawfully and feloniously conspire to violate the statutes of the State of Tennessee on the subject of absentee voting and in furtherance of said conspiracy did (1) obtain applications forms for absentee ballots from the County Commissioners of Elections and have them filled out by various voters to the effect that they expected to be away from Davidson County on election day because of business, health, education or travel, or physical disability over the voters' signatures; (2) mail or deliver said application form for absentee ballots to the Davidson County Commissioners of Elections and the Davidson County Primary Board of Election Commissioners for the purpose of having absentee ballots mailed to the persons whose names were signed to the applications; (3) after absentee ballots were mailed to the various voters, they (conspirators) in some instances collected the same uncast and unmarked for any candidate and marked or cast the ballot themselves (conspirators), and in other instances, they (conspirators) had the voters mark the ballots in their (conspirators') presence; (4) falsely attest the signature of the person purporting to cast these ballots (this was done by petitioner, Gene Jacobs, a Notary Public, Davidson County, Tennessee); and (5) sent by registered mail said ballots which had been illegally obtained, marked, cast, and notarized to the Davidson County Commissioners of Elections and the Davidson County Primary Board of Elections with the intent that said unlawfully cast ballots be counted as valid absentee ballots in the election returns.

A motion to quash this indictment was made stating that the indictment was so vague, indefinite, and uncertain the petitioner, one of the conspirators, did not have a fair or reasonable opportunity to prepare a defense. The mo-

tion to quash was apparently overruled although it does not affirmatively show in the record, and the conspirators, including the petitioner, were convicted upon a trial of the case. The evidence was not preserved by a bill of exceptions and the only question, as stated above, is the sufficiency of the indictment.

ARGUMENT.

Very similar cases have been dealt with by the federal courts. In **Padilla v. Hiatt,** 196 F. 2d 879, a very similar indictment to the one under consideration here was held to be valid and an order denying a motion for a bill of particulars was upheld. At page 881 of the opinion the court said that it was not necessary in an indictment for a conspiracy to set out in detail the evidence of the conspiracy or to describe it with the same degree of particularity required in an indictment for the substantive offense. It was held in **United States v. Konovsky,** 202 F. 2d 721, that a conspiracy to deprive any Negro inhabitant of the Town of Cicero, Illinois, from certain privileges and immunities granted them under the Federal Constitution was sufficient without naming particular individuals in the indictment.

The United States Circuit Court of Appeals, Second Circuit, in **United States v. Pleva et al.,** 66 F. 2d 529, dealing with an indictment which charged that election officials conspired to record falsely votes cast for federal officers said at page 331 of the opinion:

> "The further ground of demurrer that the voters who were injured were not specifically named is untenable. While the allegation that legally qualified voters who voted in this election district were injured and oppressed by not having their votes counted and returned as cast charged an invasion of the personal right of voters, and so was covered by the section Congress saw fit to retain, the violation of this section is a public wrong. In proving the offense, it is therefore of no moment to allege which voters, among those who voted, were deprived of the right

to have their votes counted and returned as cast. One of the objects to be attained in our method of voting is to make it impossible for anyone but the voter to know how he voted. And, when a voting machine is used by numerous voters who vote for numerous candidates and some votes are tallied for every candidate, it is, of course, impossible to know whether the vote of any particular voter has been correctly tallied or not, unless all the votes cast are correctly tallied. Nor can an accused be embarrassed in his defense by the fact that no individual voter is identified by name in the indictment. Even if known, the failure to allege the name of an injured voter would not make the indictment demurrable, though the government in that event might be, on motion, required to disclose whose votes were not correctly tallied. It is obvious that, if the government had to allege and prove the names of the individual voters whose votes were miscounted in erroneously taking the tally from a voting machine, this statute would in every practical way be a nullity as applied to such an election as this. While such a consideration is not decisive, any such nullification of the law is to be avoided unless there are compelling reasons for not doing so, and there are none here."

Very similar results were reached in the case of **People v. Quesse**, 142 N. E. (Ill.) 187, and **Johnson v. State**, 126 S. W. 2d (Ark.) 289. See also Vol. 15, C. J. S., Section 84, Conspiracy, page 1117, for the following excerpt:

". . . but where no intent as to any particular person was formed, it should charge an intended wrong against some person, persons or class of persons or the general public. In such cases it is unnecessary to designate any particular individual."

In view of the foregoing, it is recommended that the petition for writ of certiorari in this case be denied.

Respectfully submitted,

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GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

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By THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

I certify that I forwarded a copy of this Answer to Petition for Writ of Certiorari to Mr. James H. Bateman, Attorney at Law, Stahlman Building, Nashville, Tennessee, and to Mr. William C. Wilson, Attorney at Law, 200 Union Street, Nashville, Tennessee, on this the .... day of June, 1965.

Thomas E. Fox,
Assistant Attorney General.